IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 373 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DEVENDRASINGH INSPECTOR

Versus

STATE OF GUJARAT

Appearance:

1. Special Criminal Application No. 373 of 2002

MR AD SHAH with MR SR BRAHMBHATT for Petitioner Nos.1-5

MR AD OZA, PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE R.P.DHOLAKIA

Date of decision: 09/05/2003

C.A.V. JUDGEMENT

This petition under Sec.482 of the Code of Criminal Procedure has been filed for quashing and setting aside the registration of Crime Register No.I-20

of 2002 made at Kandla Police Station qua the present petitioners or in the alternative, filed under Article 226 of the Constitution of India for issuing writ of mandamus and/or any other appropriate writ so as to prevent the responsible authorities of Kandla Port Trust and Central Industrial Security Force from harassing the petitioners-accused during the pendency of investigation.

2. It may be stated here that though complaint has been filed against 12 accused persons, petitions have been preferred by original accused No.1 and Nos.8 to 11. Original accused No.1 has preferred Special Criminal Application No.440 of 2002 while original accused Nos.8 to 11 have preferred present petition i.e. Special Criminal Application No.373 of 2002. However, original accused Nos.2 to 7 and 12 have not preferred any petition.

3. Since Special Criminal Application Nos.440 of 2002 and 373 of 2002 have arisen out of same Crime Register of Kandla Police Station, both these petitions were heard together. However, since the learned counsel for the petitioner of Special Criminal Application No.440 of 2002 has sought permission to withdraw the petition qua original accused No.1, a separate C.A.V. judgment and order is being passed in that matter.

4. The facts in short are that on 12-5-2002 at about 6.00 p.m., a truck bearing registration No.GJ-12-W-5135 was intercepted by the CISF personnel posted at West Gate No.11 of Kandla Port. Though Gate Pass in respect of the truck showed "8000 MT jute bags", the said truck was found to have been carrying 201 bags of rice and 76 bundles of empty gunny bags and hence, said truck and cargo were detained and Traffic Manager of Kandla Port Trust was informed of the incident. A detailed inquiry was conducted which was completed by the Traffic Manager on 5-6-2002. Since the Commandment, CISF, was authorized to lodge formal FIR with the police, a written letter was sent to PSI, Kandla Police Station, for registration of offence on behalf of Kandla Port Trust and CISF. It was informed by the police officer of Kandla Police Station that FIR was already lodged by the police for the offences punishable under Secs.379, 511, 201, 120-B, 114, 467 and 468 of the Indian Penal Code against 12 persons. Since present petitioners were named as accused in said FIR, present petition has been filed for quashing the FIR.

5. Heard Mr.A.D.Shah with Mr.S.R.Brahmbhatt, learned counsels appearing for the petitioners and Mr.A.D.Oza,

learned Public Prosecutor for the respondent-State. It may be stated herein that name of Mr.S.R.Brahmbhatt is also on the panel of Kandla Port Trust as its standing counsel.

6. Learned counsel for the petitioners has argued the same which have been contended in his petition and hence, I would not like to repeat the same again. It is required to be mentioned at this stage that Mr.D.R.Agrawal, PSI, LCB, Bhuj, has filed an affidavit-in-reply on behalf of the respondent. However, rejoinder to affidavit-in-reply has been filed only by the petitioner No.3. In reply to the rejoinder, affidavit-in-sur-rejoinder has been filed on behalf of the respondent by Mr.R.P.Udhwani, Dy. Supdt. of Police, CID Crime, Rajkot Zone. Written submissions have also been filed by Mr.A.D.Shah, learned counsel for the petitioners which in two fold. First part from page Nos.1 to 5 are about the procedure, practice and factual data whereas second part is about the legal submissions and citations which I will deal with in this order. However, the main contentions raised by the learned counsel for the petitioners in his written arguments would be dealt with hereinafter.

7. The factual data as pointed out by learned counsel for the petitioners is that accused No.1 is doing business in the name and style of Cargo Conveyors Pvt. Ltd. ("CCPL" for short) and Priyanka Overseas Ltd. ("POL") for short is a client of accused No.1. Food Corporation of India ("FCI" for short) decided to export surplus foodgrain at subsidized rates whereby the rice are supplied to Indian exporter @ Rs.5,600/- PMT with variation of Rs.100/200 PMT. For that, procedure has been prescribed as mentioned in detail by the petitioners in para (i) of Point No.1 under factual data. Procedure regarding sale of cargo to buyer, procedure to comply with customs and documents to be filed therein, etc. are also stated therein. He has drawn my attention towards practice and procedure to be followed during the process wherein he has shown me the relevant dates relating to the incident in question. It is pointed out that Kandla Port Trust ("KPT" for short) officials did not permit passage of truck bearing registration No.GJ-12-W-5135 along with 200 bags of rice without proper and correct inquiry. It is further pointed out that for the purpose of removal of empty jute bags, all formalities of port and custom were completed by the party and necessary gate pass was also with them, however, said gate pass was not issued by KPT.

8. Before I proceed further with the matter, I would like to make clear that complaint has been filed by PSI, Kandla Police Station, against 12 persons on 6-6-2002.

9. I would now deal with the legal submissions made by Mr.A.D.Shah, the learned counsel for the petitioners-original accused Nos.8 to 12. The first contention raised by him is that whether registration of FIR under Sec.156(1) read with Sec.154 is justified or not. According to him, Secs.379, 511, 201, 120-B, 114, 467 and 468 against accused Nos.8 to 12 are justifiable and proper while FIR against accused Nos.8 to 12 is not sustainable in the eye of law as it does not disclose the prima-facie ingredients of offence of conspiracy or abetment.

9.1 In this connection, he has relied upon the case of Ajay Mitra Vs. State of M.P., JT 2003(1) S.C. 418 wherein it has been held by the Apex Court by placing reliance on the decisions reported in AIR 1982 SC 949 and AIR 1992 SC 604 as under:

> "As mentioned earlier, the allegations made inthe complaint, even if they are taken at their face value and accepted in their entirety, do not constitute any offence against the appellants. Therefore, the complaint filed by the respondents and the FIRs registered in pursuance hereof are liable to the quashed. "

Mr.Shah has drawn my attention towards the ratio laid down by the Apex in the above reported judgment which reads as under:

> "It is purely not within the province of the police to investigate into a report (FIR) which does not disclose the commission of a cognizable offence and the Code does not impose upon them the duty of inquiry in such cases".

9.2 He has relied upon another case of State of Karnataka Vs. Arun Kumar Agarwal and Ors. reported in AIR 2000 SC 411 wherein it has been held by the Apex Court as under:

> "The acts of persons will not be subject of criminal investigation unless a crime is reported to have been committed or reasonable suspicion thereto arises on mere conjecture or surmise as a flight of fancy that some crime might have been committed, somewhere, by somebody but the crime

is not known, the persons involved in it or the place of crime unknown, cannot be termed to be reasonable basis at all for starting a criminal investigation."

10. I entirely agree with the law laid down by the Apex Court in the aforesaid judgments. However, same are required to be evaluated keeping in mind the facts of the present case and if it is found that FIR does not disclose the commission of cognizable offence, then Court does not impose upon them the duty of inquiry in such cases. Same way, investigation cannot be done on the basis that some crime might have been committed somewhere by somebody but the place of crime and the persons involved in it are not known.

11. It is further pointed out by him that action on the part of CISF and KPT authorities clearly rules out existence of any criminal conspiracy or intentional aid by accused Nos.8 to 12. It is further pointed out that offence under Sec.379 read with Sec.511 is not prima facie disclosed qua accused Nos.8 to 11. For this, he has taken me through the factual details narrated in his written submissions at para IV, page 4 and argued that failure to export would not be beneficial to the purchaser from FCI as the exporter gets release of payment from the bankers on submission of documents such as Mates Receipt, Bill of Lading and other scrutinised documents handed over by customs house agent and, therefore, Sec.379 will not be attracted in this case. It has been further pointed out that party can remove goods with the permission of customs authorities and if such permission is granted, there is no violation of provisions of Customs Act and buyer will not be entitled to the benefit of export advantage.

11.1 He has also relied upon the case of Harichandran Vs. State (Madras High Court), reported in 1997 Cri.L.J. page 41 wherein the Court has interpreted Secs.379 and 427 keeping in mind the facts available before it. In that case, accused was the owner of land and was illegally quarried from his land and transported rocks for commercial purpose and caused wrongful loss to the extent of Rs.10,000/- to the Government.

11.2 He has also relied upon the case of Chittiboyina Vs. Danduboyina Narappa, 1939 (40) Cr.L.J. page 908 (Madras High Court) wherein it has been held based on facts as under:

"Owners removing the cattle which were taken to the pound but neither the pound keeper nor anybody was there."

11.3 He has also relied upon the case of EJ Judah & Others Vs. King Emperor, AIR 1926 Calcutta page 464. The facts of that case was that certain article which was given for repair by the accused to the complainant was removed by forcibly entering at the shop of complainant without making payment for part repairs on account of the fact that repair was not carried out in time. Relying upon this judgment, it has been contended by Mr.A.D.Shah that removal of rice bag by accused Nos.1 to 7 would not attract the necessary ingredients of definition of Sec.378 as no wrongful loss is caused to FCI and there is no wrongful gain to CCPL or POL inasmuch as they would not be entitled to avail all substantive rights. If the permission as required for removal is not obtained, then it may attract the provisions of Customs Act where offences are not cognizable and the proceedings cannot be initiated by private complaint with the previous sanction of the Commissioner of Customs.

12. It has been vehemently argued by Mr.A.D.Oza, learned Public Prosecutor for the State that there are ample evidence on record connecting the petitioners with the offence in question and hence, investigation should be ordered to be carried out for reaching the roots of the offence. It is contended by him that since on a thorough preliminary inquiry it was found that officials of Kandla Port Trust and CISF are involved in illegal activities, they are named as accused in FIR and merely because they are employees of KPT and CISF, investigation should not be permitted to be stopped and ad-interim stay granted earlier while issuing notice may be vacated. According to him, since there was a long delay in initiating action on coming to know of the theft and forgery having been noticed by some officer on duty, involvement of the employees of Port Trust and CISF cannot be ruled out at this stage and hence, it is in the interest of justice that investigating agency be permitted to carry out investigation without fear or favour to find out the real perpetrators of offence which is affecting the economy and security of the nation.

13. There cannot be any dispute regarding the judgments relied upon and arguments advanced by the learned counsel for the petitioners. If the same is considered keeping in mind the ingredients of offence disclosed in FIR and detailed affidavit-in-reply and affidavit-in-sur-rejoinder filed by the investigating

agency, it can be seen that the complaint in question is not as simple as argued by the learned counsel for the petitioners that it was the rice of the ownership of concerned person who was taking back the same from the Kandla Port without obtaining any permission. But factual aspects appeared in the complaint and the detailed affidavits filed by the investigating agency and Deputy Superintendent of Police, CID Crime, Rajkot prima facie disclose the ingredients of offence in question qua the petitioners. It is true that petitioner No.5 is the Traffic Manager of KPT, who has not been shown as accused in the FIR and as the investigation which is still to be done has been stayed as per the order passed by this Court (Coram: A.K.Kapadia,J.), looking to the seriousness of the offence, same has been handed over by the State authority from the Kandla police to CID crime and, therefore, in the interest of justice, it is not necessary to evaluate the facts as prima facie established from the FIR, other documents and counter-affidavits filed by the authorities as it will prejudice the investigation and the parties to it and those who are not before this Court also and, therefore, I am not discussing in detail at this stage. Since the FIR is only a tip of iceberg, it requires detailed investigation for reaching the roots of offence and, complaint in question cannot be quashed at this stage. On the contrary, it was the duty of the petitioners to have invited thorough investigation. Having not done so, they preferred the petition trying to brush up the serious offence at initial stage.

14. It reflects from the arguments and from the record that initially janvajog entry No.11 dated 27-5-2002 has been made and preliminary inquiry to that effect has been initiated. It is apparent from the record that there was no gate pass for the rice tried to be secretly and illegally removed but the gate pass was for empty jute bags in the name of unauthorized person and hence, it appears to be forged and got up by the accused persons. It also reflects from the proceedings that no prompt action has been taken by the authority though officer on duty was known of the alleged theft and hence, alleged communication dated 29-5-2002 made by the Kandla Port Trust authorities are required some further investigation.

15. It has been categorically stated by the Deputy Supdt. of Police, CID Crime, Rajkot in his affidavit-in-sur-rejoinder which has been filed in reply to the rejoinder affidavit filed by the petitioner No.3 after going through relevant records that investigating

agency has ample evidence on record at this stage to establish involvement of the accused persons in the incident in question. As regards the offence of Sec.120-B, it has been stated by him on oath that if the entire piece of evidence is gone through minutely, then a complete chain can be formed so as to show that a conspiracy has been hatched jointly by the accused-persons depicting their respective roles. It is further stated by him that conspiracy cannot be established looking at a piece of evidence in isolation, but totality of the facts and circumstances coupled with the materials clearly suggest that the accused persons, with aid and abetment of each other, have tried to secretly and silently brush up the entire issue and destroy the vital piece of evidence and hence, offence of Sec.201 is also rightly levelled against the accused persons.

16. I am in agreement with the views expressed by the Deputy Supdt. of Police CID Crime, Rajkot in his affidavit. Therefore, in my opinion, fair and just investigation is a must for the purpose of reaching the roots of the offence.

17. Something has been said as regards accused No.1 in para 11 of the affidavit-in-rejoinder by the deponent regarding the interest shown by the present petitioners qua accused No.1. However, since the petition filed on behalf of the accused No.1 has been sought to be withdrawn, it is not in the interest of justice to say anything on this and hence, I am of not discussing further in that regard.

18. It is revealed from the record and proceedings and from the affidavits that soon after the incident, conversations have taken place between one of the accused and some other persons. However, time at which the conversation has taken place and the persons with whom it has taken place interconnect the incident or the offence which clearly establish the involvement of the accused persons in the crime in question and, therefore, at this stage, it cannot be said that involvement of the present petitioners are only on the basis of assumption and presumption. On the contrary, evidence on record prima facie reflects involvement of the accused in the crime in question.

19. It is to be noted that the offence pertains to the security and economy of the nation. It is also to be noted that the offence is not as simple as argued by the learned counsel for the petitioners of simple removal of goods of the ownership of concerned person. However, it

might be a racket which is going since long and hence, investigation cannot be interfered with. A show has been made by the exporters in this case that by way of exporting goods, they are taking economic benefit and other benefits offered by the Government for export. However, it appears to me that the exporters, without exporting the goods sent to Kandla Port Trust, are smartly and secretly removing the goods meant for export outside the KPT and are getting economic benefit and other rewards as if they have really exported the same and contributed towards foreign currency to the country. In this view of the matter, offence in question should not be treated as so simple and evaluated only on the basis of FIR but has to be considered keeping in mind other aspects of the matter comingforth during the course of investigation though revealed in the complaint filed by the PSI, Kandla Police Station and some serious thing which has not been mentioned in the complaint cannot be ignored by this Court at this stage without giving any opportunity to the investigating agency to investigate further. On the contrary, it is the prima-facie duty of the petitioners to help the investigating agency in reaching the roots of the offence rather than sitting in driver's seat and applying break over further investigation. In my view, the preliminary inquiry held by them also is required to be inquired into.

20. An argument has been advanced on behalf of the petitioners that the matter is required to be dealt with either by the customs authority or the CISF personnel. However, same cannot be accepted at this stage for the simple reason that the complaints filed by them in past for the same offence before Kandla Police Station are pending. It is surprising to note that though petitioner No.5 has not been named as accused in the FIR, he has rushed to this Court in the capacity of Traffic Manager, Kandla Port Trust, apprehending his involvement in the offence as an accused.

21. Reliance is placed on a decision of the Apex Court in the case of State of Kerala and Others Vs. O.C.Kuttan and Others with Seena and another Vs. State of Kerala and Others, AIR 1999 Supreme Court 1044 wherein it has been held in para 6 as under:

> "At the outset there cannot be any dispute with the proposition that when allegations in the F.I.R. do not disclose prima facie commission of a cognizable offence, then the High Court would be justified in interfering with the investigation and quashing the same as has been held by this Court in Sanchaita

Investment's case, (1982) 1 SCC 561: (AIR 1982 SC 949). In the case of State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335: (1992 AIR SCW 237), this Court considered the question as to when the High Court can quash a criminal proceeding in exercise of its powers under Section 482 of the Code of Criminal Procedure or under Article 226 of the Constitution of India and had indicated some instances by way of illustrations, though on facts it was held that the High Court was not justified in quashing the first information report. This court held that such powers could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised. But as an illustration several circumstances were enumerated. Having said so, the Court gave a note of caution to the effect that the power of quashing the criminal proceedings should be exercised very sparingly with circumspection and that too in the rarest of rare cases, that the Court will not be justified in embarking upon an inquiry as to the reliability or genuineness or otherwise of the allegations made in the F.I.R. or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice. It is too well settled that the first information report is only an initiation to move the machinery and to investigate into a cognizable offence and, therefore, while exercising the power and deciding whether the investigation itself should be quashed, utmost care should be taken by the Court and at that stage it is not possible for the Court to shift the materials or to weigh the materials and then come to the conclusion one way or the other. In the case of State of U.P. v. O.P. Sharma (1996) 7 SCC 705: (1996 AIR SCW 1229), a three-Judge Bench of this Court indicated that the High Court should be loath to interfere at the threshold to thwart the prosecution exercising its inherent power under Section 482 or under Articles 226 and 227 of the Constitution of India, as the case may be and allow the law to take its own course. The same view was

reiterated by yet another three-Judges Bench of this Court in the case of Rashmi Kumar v. Mahesh Kumar Bhada, (1997)2 SCC 397, where this Court sounded a word of caution and stated that such power should be sparingly and cautiously exercised only when the Court is of the opinion that otherwise there will be gross miscarriage of justice. The court had also observed that social stability and order is required to be regulated by proceeding against the offender as it is an offence against the society as a whole."

22. Keeping in mind the parameters laid down in the aforesaid judgment and on a thorough scrutiny of the record and proceedings of the case, it cannot be said that the allegations made in the complaint do not make out any prima-facie offence against the petitioner. Since the allegations made in the complaint disclose the prima-facie ingredients of offence against the petitioners, I am of the opinion that it is not a fit case to exercise power either under Sec.482 of the Code of Criminal Procedure or under Article 226 of the Constitution of India. The arguments advanced and the defence putforward on behalf of the petitioners cannot be considered at this preliminary stage especially when the process of investigation has been stayed by this Court (Coram: A.M.Kapadia,J.) while issuing notice vide order dated 19-6-2002. Hence, this petition is required to be rejected.

23. This petition is hereby rejected. Rule is discharged. Ad-interim relief granted earlier stands vacated. Investigating agency is directed to proceed with the investigation of Crime Register No.I-20 of 2002 registered with Kandla Police Station.

24. The observations by this Court in this judgment being made for the purpose of deciding this petition, same shall not prejudice the parties either in investigation or in trial.

(R.P.DHOLAKIA,J.)

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Further Order

After pronouncement of the order, Mr.Saurin Shah for Mr.A.D.Shah, learned counsel for the petitioner requests that since the petitioners would like to approach the higher forum, interim relief granted earlier by this Court be continued for a period of six weeks. Looking to the facts and circumstances, interim relief granted by this Court (Coram:D.H.Waghela,J.) vide order

dated 27-9-2002 passed in this matter is ordered to be continued for a period of six weeks to enable the petitioners to approach the Apex Court.

(R.P.DHOLAKIA,J.)

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